United States Court of Appeals

for the Second Circuit

PETITIONER'S BRIEF

76-3077

To be argued by JOSEPH S. DAVIES, JR.

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Petitioner

v.

HONORABLE JON O. NEWMAN,

Respondent

BRIEF FOR THE UNITED STATES IN SUPPORT OF A PETITION FOR A WRIT OF MANDAMUS TO THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

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TABLE OF CONTENTS

Cases: Page

Cases cont'd: Page

Constitution, Statutes and Rules:

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QUESTION PRESENTED

Whether the district court significantly departed from controlling legal principles in holding that there was a prima facie case of invidious discrimination in the federal prosecutor's exercise of peremptory challenges in this case and, as a consequence of this holding, in reassigning all Black veniremen peremptorily challenged by the government to the jury pool.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III §2 of the Constitution provides in pertinent part:

* * * * *

> The trial of all Crimes, except in cases of Impeachment, shall be by jury; ...

Rule 23 of the Federal Rules of Criminal Procedure provides in pertinent part:

> (a) Trial by Jury. Cases required to be tried by jury shall be so tried unless the defendant waives a jury trial in writing with the approval of the court and the consent of the government.
>
> (b) Jury of Less Than Twelve. Juries shall be of but at any time before verdict the parties may stipulate in writing with the approval of the court that the jury shall consist of any number less than 12.

Rule 24 of the Federal Rules of Criminal Procedure provides in pertinent part:

* * * * *

> (b) Peremptory Challenges. If the offense charged is punishable by death, each side is entitled to 20 peremptory challenges. If the offense charged is punishable by imprisonment for more than one year, the government is entitled to 6 peremptory challenges and the defendant or defendants jointly to 10 peremptory challenges. If the offense charged is punishable by imprisonment for not more than one year or by fine or both, each side is entitled to 3 peremptory challenges. If there is more than one defendant, the court may allow the defendants additional peremptory challenges and permit them to be exercised separately or jointly.

(c) Alternate Jurors. *** Each side is entitled to 1 peremptory challenge in addition to those otherwise allowed by law if 1 or 2 alternate jurors are to be impanelled, 2 peremptory challenges if 3 or 4 alternate jurors are to be impanelled, and 3 peremptory challenges if 5 or 6 alternate jurors are to be impanelled. The additional peremptory challenges may be used against an alternate juror only, and the other peremptory challenges allowed by these rules may not be used against an alternate juror.

STATEMENT

1. On April 21, 1976, an indictment was returned in the United States District Court for the District of Connecticut charging Margaret Lee Robinson with embezzlement of $1,779.00 from a federally insured bank in violation of 18 U.S.C. 656 (Count I) and Jethro R. Brown, Patricia Savarese, and Margaret Lee Robinson with conspiracy to embezzle $1,779.00 in violation of 18 U.S.C. 656 and 371 (Count II). (App. 1-2). The case against defendants Savarese and Robinson was called for trial before Judge Jon O. Newman on June 21, 1976. Margaret Lee Robinson is Black. Following challenges for cause, the petit jury pool consisted of 37 persons including four Blacks. The government was allotted 7 peremptory challenges and the defense 13, so as to leave 12 jurors and five alternates, the ultimate determination between jurors and alternates to be made by lot (App. 17). The defense exercised all of its 13 challenges, choosing not to challenge any of the Blacks. The prosecution exercised its peremptory challenges to exclude

three of the White veniremen and the four Black veniremen. At that point, the twelve jurors and five alternates having been chosen, defendants moved to "expunge" the government's peremptory challenges against the four Black veniremen on the ground that the prosecutor had struck all of the Blacks in the jury pool and thus was guilty of invidious discrimination (App. 17-18). The court instructed the Clerk to maintain a record of the names of the 17 individuals who had been selected as jurors and alternates and of the four Blacks who had been challenged by the prosecutor. The judge then asked the prosecutor whether he wished to state a non-racial reason for challenging the four Blacks. The prosecutor declined on the ground that giving a reason for his challenges would be contrary to the purpose and nature of peremptory challenges (App. 20-23, 60). The case was continued to permit the defendants time to present a statistical analysis to support their claim that the United States Attorney in Connecticut systematically excludes Blacks from criminal juries, especially in cases where the defendants are Black (App. 60).

2. The data compiled by defendants from the jury selection records in the Clerk's office concerning the selection of petit juries in the 71 criminal cases in the District during the preceding two years showed that there had been a total of 78 Blacks in jury pools following challenges for cause, of whom the prosecution had peremptorily challenged 53 and the defense

had challenged 7, thus leaving 18 Blacks to serve as jurors (App. 53). In other words, from Connecticut's Black population of 5% (App. 65), the percentage of Blacks among the total veniremen in the general array was 3.15%, and among persons seated as jurors was 2.11% (App. 54). These figures further indicated that one or more Blacks served on 60% of trials involving Black defendants in New Haven and on 33% of the jury trials in the entire district in the case of a White or Black defendants (Ibid.). The court viewed these statistics as indicating prejudice in jury selection. Adding the statistics involved in the instant case to the statistics from the 71 cases compiled by the defense the district court concluded that these figures showed "that the pattern of government peremptory challenges of Black veniremen has now reached an excessive point***" (App. 67). The court characterized the data as follows:

> ***The data show that 82 Negroes have been included in the final group [*/] eligible for jury selection, and that the prosecutors have exercised their peremptory challenges to strike 57 of these, or an exclusion rate of 69%. In cases involving White defendants 49 Negroes were in the final group and the prosecutors challenged 29 for an exclusion rate of 59.2%. In cases involving Black or Hispanic defendants, 33 Negroes were in the final group, and the prosecutors challenged

*/ As used in the district court the term "final group" meant the jury pool after challenges for cause.

28, for an exclusion rate of 84.8%. [**/] Of the 72 trials analyzed, Blacks were seated as jurors in only 13 instances, or 18.1%, and in 10 of these, only one Black juror was seated.

He also predicated his analysis in large measure on "the background of data concerning the percentage of Blacks summoned for jury duty" (App. 64) although no unconstitutional discrimination in this regard was shown. In this regard Judge Newman noted that this approach was "arguably at odds with" (App. 76-77) the Supreme Court's decision in Swain v. Alabama, 380 U.S. 202 at 228, n.32.[1/] Nevertheless, Judge Newman stated that "the underrepresentation of Blacks in the jury wheels of this District mandates that this Court not be reluctant to place some limits on the extent to which peremptory challenges can further preclude Blacks from participating as jurors in criminal trials. ..." (App. 65) and, that "the rate of exclusion of Black veniremen by prosecutors' challenges becomes less acceptable as the rate of Blacks serving on juries falls significantly below the statistically expected rate based on the prevailing Black population,

**/ If the statistics relating to Hispanics are not included with the statistics relating to Blacks, the figures presented by defendants show that the government's exclusion rate for Black veniremen in trials of Blacks is 78.26%. If the figures involved in the Robinson trial are included the rate is 81.48% (App. A).

1/In Swain, supra, at 228, n.32 the Court had observed that "[a]bsent a showing of purposeful exclusion of Negroes in the selection of veniremen, ... the lower proportion of Negroes on the venire list sheds no light whatsoever ... on whether the prosecutor systematically strikes Negroes in the count [and] [m]oreover, the constitutional issue in regard to the prose- [Footnote cont'd.]

even though the disparity is attributable only in part to the prosecutor's use of peremptory challenges" (App. 66). Accordingly, Judge Newman held that the population rate for Blacks in the District of Connecticut is "the context in which the present claim of excessive use of peremptory challenges against Blacks should be considered" (App. 66). He implemented these principles based on his findings here that the overall exclusion rate for Blacks through the government's exercise of peremptory challenges was 69% and that if no challenge against Blacks had occurred in those cases where a Black was included in the final panel, 1 Black should be expected to be seated as a jury 68%, instead of only 33.3%, of the time.[2/] From this, Judge Newman concluded that "the pattern of government peremptory challenges has now reached an excessive point that calls for the exercise of this Court's supervisory power over the conduct of criminal trials in this District" (App. 66-67).

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cutor's systematic use of strikes against Negroes remains much the same whatever the number of Negroes in the venire list."

2/ This 33.3% figure therefore included defense challenges to Blacks (App. 67). Moreover, the 68% figure is based on an assumption that all "final panels" consist of 28 individuals (App. 66-67). Our research (App. 86-97) indicates "final panels" have an average of 48 persons. (See App. G, the number of persons in final panels (1352) divided by the number of trials equals 48).

Judge Newman explained that he had no doubt that all the prosecution's peremptory challenges of Blacks in the statistics supplied him were based on the prosecutor's belief the strikes would lessen the bias in favor of the defense and that they had not been motivated by a racial animus; but he explained, however, that he was basing his ruling on the distinction between prosecutorial "intent" and "motivation" (App. 68-69):

> In reaching this conclusion, I do not attribute to the prosecutors of the United States Attorney's office in this District any racist animus. An affidavit from the United States disclaims, for himself and his office, any anti-Black motivation in the challenges to Black veniremen that have occurred. Under the Supreme Court's decision in Swain, a federal prosecutor is entitled, in any particular case, to challenge a Black venireman for any reason at all, as long as that reason is related to his view concerning the outcome of that case. I have no doubt that in the cases analyzed for the past two years, the prosecutors honestly believed that the striking of Black veniremen would lessen the risk of bias in favor of the defendant and thereby increase the likelihood of a bias-free jury. In some instances Black veniremen may have been challenged for reasons having nothing to with race. For example, the prosecutors may have used some peremptories to exclude veniremen with limited education and Blacks may have been disproportionately represented in the group of veniremen with limited education. However, the high rate of exclusion of Black veniremen and the fact that the rate is higher for trials of minority defendants than White defendants indicates that in a large number of instances Black veniremen were challenged because they were Black. Even in these instances, though the prosecutor's intention is clearly to exclude a person because he is black, the prosecutor may have a motivation

unrelated to any hostility toward Blacks.***/ He may simply believe that a Black juror may be somewhat partial to a Black defendant.

Whether having little formal education or being of the same race as a defendant correlates to any significant extent with partiality toward the defendant is far from clear, but I do not ascribe to the prosecutors any impropriety for entertaining such views, whether or not I happen to agree with them. Swain gives them the right in any particular case to act upon such views. But Swain intimates, and the appellate cases already cited make clear, that when prosecutors excessively use their peremptory challenges to exclude Blacks from the process of jury trials, corrective action is warranted to make sure that the right of Blacks to participate in the citizen's role in the administration of criminal justice is not impaired. The challenges may have been legitimate in individual cases. But their cumulative effect has now reached the point where corrective action should be taken.

***/This is not a case like Davis v. Washington, 44 U.S.L.W. 4789 (June 7, 1976), where governmental action disproportionately affecting Blacks was held not to violate the Equal Protection Clause for lack of evidence of any intent to single out Blacks for adverse treatment. The figures disclosed in this litigation, like those in the cases distinguished in Davis, e.g., Cassell v. Texas, 39 U.S. 282 (1950); Patton v. Mississippi, 332 U.S. 463 (1947), make it abundantly clear that the prosecutors intended to exercise their peremptory challenges disproportionately against Black veniremen and intended to do so because the veniremen were Black. Their intent is evident; it is their motivation that I am willing to assume is not grounded in racial animus.

As a remedy, Judge Newman entered an order assigning the four Black veniremen who had been struck by the prosecution to the pool of 12 jurors and five alternates who had been selected in this case and required that the jurors and alternates be selected again from this new pool by removing four individuals by lot. As a "prospective remedy" "to lessen the pattern of Black challenges" (App. 69-70), Judge Newman also ordered the United States Attorney's office to maintain a record for each criminal trial of the number of Blacks included in the final panels against which peremptory challenges are exercised and those challenged peremptorily by the prosecutor "without explanation."[3/] He further directed it to maintain a record of the number of all criminal trials in the district and the number of such trials in which at least one Black is included in the final panel and in which at least one Black is

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3/ The Court noted (App. 70-71):

> ... The caveat "without explanation" is added simply to insure that the government is always free, if it so desires, to place on the record any non-racial reason it may have for challenging a Black venireman, in which event such challenges, adequately explained, will not be counted in determining the ensuing pattern of Black peremptory challenges.

empaneled as a juror or an alternate. A summary report of these records was ordered to be furnished every 90 days to the district court with copies to the New Haven and Hartford offices of the Federal Public Defender, for availability for inspection by any defense counsel. Additionally, Judge Newman warned the United States Attorney that this data would provide a basis for determining whether the prosecutor's exercise of peremptory challenges against Blacks will have continued at such "an excessive rate" that further corrective action, including disallowance of peremptory challenges against Blacks after such a pattern has been shown to have continued, might be warranted. He also admonished the United States Attorney that convictions obtained "during any future period in which such a pattern has been shown to have continued might be in jeopardy" (App. 71).

3. On October 15, 1976, the government requested Judge Newman to reconsider his decision on the grounds that the prosecution did not have sufficient time to respond to defendants' motion and that it had reason to believe the statistics submitted by defendants were "misleading" (App. 79). On November 4, 1976, Judge Newman entered an order stating he would not reconsider his decision (App. 84-85). On November 24, 1976, the United States Attorney contacted Judge Newman in order to call to his attention that the government's analysis of the court records in the cases tried in the district during the pervious two years (App. 87-97) did not correspond with the

analysis conducted by defendants and that it appeared there were at least five errors in the statistics on which his opinion in this case was based.[4/] The United States Attorney requested that Judge Newman postpone the final jury selection process in the Robinson case scheduled for November 29, 1976, and the trial scheduled for December 1, 1976, so that the judge could reconsider his ruling in light of the effect these apparent errors might have had. The United States Attorney also indicated that the prosecution intended to seek review of the opinion by mandamus in the court of appeals and therefore requested that Judge Newman postpone further action. Judge Newman declined to do so.

On November 29, 1976, the jurors and two alternates were selected.[5/] One juror and one of the alternates came from among the Black veniremen appointed by Judge Newman. Further proceedings were stayed by an order issued by this Court on December 1, 1976, pending disposition of the government's petition for a writ of mandamus.

4/ While these figures do not relate to the information regarding the trial of Blacks, they would somewhat significantly lower the over-all exclusion rate of Blacks by prosecutorial peremptory challenge from 69% to 65% (App. F).

5/ One of the four Blacks appointed by Judge Newman was subsequently permanently disqualified by another judge in the district. Judge Newman therefore agreed he should not serve on this jury, and he was not included in the jury pool.

ARGUMENT

INTRODUCTION

We begin by pointing out that we have no quarrel with Judge Newman's view "that when prosecutors excessively use their peremptory challenges to exclude Blacks from the process of jury trials, corrective action is warranted to make sure that the right of Blacks to participate in the administration of criminal justice is not impaired" (App. 69). Our quarrel lies with the application of this salutary principle to this case and the remedy fashioned to meet what Judge Newman believed were "excessive" peremptory challenges. It is our submission that applying the teaching of Swain v. Alabama, 380 U.S. 202, and subsequent circuit court decisions to the present case shows that there is no justification for the conclusion that in the District of Connecticut the prosecutor "in case after case, whatever the circumstances, whatever the crime and whoever the defendant or the victim may be,***is responsible for the removal of Negroes who have been selected as qualified jurors by the jury commissioners and have survived challenges for cause,***" Swain v. Alabama, 380 U.S. 202, 223. In short, no prima facie case of discrimination has here been shown, and there is accordingly no basis for the application of the novel remedy imposed by the court below--even assuming arguendo that in proper circumstance such a remedy would be appropriate.

I

THE REMEDY OF MANDAMUS IS APPROPRIATE IN THIS CASE

Relief lies in this case under both the "supervisory" or "advisory" mandamus power as well as the "jurisdictional" mandamus power vested in this Court by 28 U.S.C. 1651.[6] Exercise of control over the district courts under this Court's "supervisory" or "advisory" mandamus authority "to correct any truly egregious error of a district court" is appropriately invoked here on the ground that the district court applied markedly erroneous standards unmistakably contrary to accepted principles clearly established by the Supreme Court in Swain v. Alabama, 380 U.S. 202 (1965). There was in short, "a clear abuse of discretion." Schlagenlauf v. Holder, 379 U.S. 104, 110 (1964); La Buy v. Howes Leather Co., Inc., 352 U.S. 249 (1957); Kerr v. United States District Court, decided June 14, 1976, slip opinion (No. 74-1023); United States v. Alessi, Nos. 76-1189 and 3025 (2nd Cir., decided July 7, 1976) (slip opinion at 4801-4802); Kaufman v. Edelstein, 539 F.2d 811 (2nd Cir., 1976); American Express Warehousing Ltd. v. Transamerica Ins. Co., 380 F.2d 277, 282-283 (2nd Cir., 1967); Note, Supervisory and Advisory Mandamus Under the All Writs Act, 86 Harv. L. Rev. 595 (1973). The district

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6/ Particularly where, as here, a decision threatens to destroy an essential right or to produce "gross disruption in the administration of criminal justice" and a means of redress through appeal is lacking, this Court has been specially sensitive to the need (Footnote cont'd.)

court here explicitly assumed (App. 67) "supervisory power" over the jury selection process to prohibit the exercise of peremptory challenges that reduce the ratio of Blacks in general arrays from as much as 3.15% to 2.11%. Unless corrected, this continuing exercise of authority will necessarily have a significant impact on jury selection procedures throughout the District of Connecticut. In these circumstances, exercise of this Court's supervisory mandamus power to resolve the novel and important issues presented is clearly warranted.[7/]

Even apart from the foregoing, we observe that the district court fashioned a unique and unjustified remedy in assigning to the list of individuals from whom the twelve jurors and five alternates will be selected by lot for the trial of this criminal case, the four black veniremen peremptorily struck by the United States Attorney. See Will v. United States, 389 U.S. 90,

for mandamus review. E.g., United States v. Weinstein, 511 F.2d 622 (2nd Cir. 1975), cert. den., sub nom. Austin v. United States, 422 U.S. 1042; United States v. Dooling, 406 F.2d 192 at 198 (2nd Cir. 1969), cert. den., sub nom. Persico v. United States, 395 U.S. 911; United States v. Werker, 535 F.2d 198 (2nd Cir. 1967), cert. den., sub nom. Santos-Figueroa v. United States, November 1, 1976 (No. 76-5270). Similarly, the Seventh Circuit has granted mandamus relief in a case closely analogous to the one presented here. See United States v. Igoe, 331 F.2d 776 (7th Cir. 1964), cert. den., 380 U.S. 924. There, the Seventh Circuit held that although no appeal would lie a writ of mandamus would lie where a district judge dismissed an indictment for want of prosecution but actually ordered dismissal because the government refused to waive its right to a jury trial.

7/ This ruling not only threatens to affect trials involving Black defendants but also threatens cases where any member of a racial, religious, or social grouping is a defendant and there is some disparity in selection of his group for jury service.

95 (1967); Roche v. Evaporated Milk Ass'n., 319 U.S. 21, 26 (1943); United States Alkali Export Ass'n. v. United States, 325 U.S. 196 (1945); United States v. Werker, 531 F.2d 198 (2nd Cir. 1976), cert. den., sub nom. Santos-Figueroa v. United States, November 1, 1976 (No. 76-5270).[8/]

II

THE DISTRICT COURT ADOPTED CLEARLY ERRONEOUS LEGAL STANDARDS AND MISCONCEIVED THE RELEVANT FACTS IN DECIDING THAT IMPERMISSIBLE DISCRIMINATION OCCURRED IN THE PROSECUTOR'S EXERCISE OF PEREMPTORY CHALLENGES

A. The District Court Adopted Erroneous Legal Standards.

Judge Newman's legal approach is completely at odds with the principles adopted by the Supreme Court in Swain v. Alabama, 380 U.S. 202 (1965). In Swain, the facts showed that while twenty-six per-cent of the population of the county in which Swain was convicted, was Black, Blacks constituted on the average between ten and fifteen percent of the membership of the grand and petit jury panels drawn by lot from the county jury list since 1953. They also showed that although Blacks frequently served on grand juries in the county and there had been an average of six to seven Blacks

8/ See also, e.g., United States v. Norton, 539 F.2d 1082 (5th Cir. 1976) (mandamus is appropriate where a district judge reduces sentence after the time provided by F.R.Crim.P. 35); Board of Parole v. Merhige, 487 F.2d 25 (4th Cir. 1973), cert. den., 417 U.S. 918 (mandamus is appropriate where a district judge grants a discovery order of a sort completely beyond his power).

on petit jury venires in criminal cases, none had survived the striking of the panel to serve a petit jury since at least 1950. Despite this factual background, the Supreme Court held in respect to Swain's claim that the prosecutor's exercise of peremptory challenges violated the equal protection clause of the Fourteenth Amendment that, given the nature and purpose of the peremptory challenge, the presumption that "the prosecutor is using the challenges to obtain a fair and impartial jury" cannot be overcome in any single case by showing the prosecutor removed all Blacks from the petit jury pool (380 U.S. at 222).

The Court stated that the essential nature of a peremptory challenge is that "it is to be exercised without a reason stated, without inquiry, and without being subject to the court's control" (id., at 220) and that to subject the prosecutor's challenges to the demands of the Equal Protection Clause would effectively end its peremptory nature. The Court observed, however, that continuous use of peremptory challenges over a period of time as a means of excluding Blacks from all juries, merely because of their race, might be unconstitutional:

> ***when the prosecutor in a county, in case after case, whatever the circumstances,

> whatever the crime and whoever the defendant or the victim may be, is responsible for the removal of Negroes who have been selected as qualified jurors by the jury commissioners and who have survived challenges for cause, with the result that no Negroes ever serve on petit juries, the Fourteenth Amendment claim takes on added significance.... In these circumstances, giving even the widest leeway to the operation of irrational but trial-related suspicions and antagonisms, it would appear that the purposes of the peremptory challenge are being perverted. If the State has not seen fit to leave a single Negro on any jury in a criminal case, the presumption protecting the prosecutor may well be overcome. Such proof might support a reasonable inference that Negroes are excluded from juries for reasons wholly unrelated to the outcome of the particular case on trial and that the peremptory system is being used to deny the Negro the same right and opportunity to participate in the administration of justice enjoyed by the white population. These ends the peremptory challenge is not designed to facilitate or justify. Id., at 223-224.

In Swain the Court found that because the record did not with any acceptable degree of clarity show "how often and under what circumstances the prosecutor alone ha[d] been responsible for striking those Negroes who have appeared on petit jury panels in Talladega County" (id., at 224, emphasis added), Swain had failed to make a sufficient showing to "support an inference that the prosecutor was bent on striking Negroes, regardless of trial-related considerations" (id., at 226).

As the foregoing discussion of Swain demonstrates, Judge Newman adopted standards radically at variance with key principles. Beyond this, he took into consideration general population figures as the staring point for any inquiry into the validity of the prosecutor's exercise of peremptories. But the Supreme Court ruled in Swain that absent a showing of purposeful systematic exclusion of Blacks as veniremen, the percentage of Blacks in the population sheds no light on the question whether invidious discrimination in the exercise of peremptory challenges has been established.[10/] Moreover, in Swain the Court refused to apply to the claim that there had been discrimination in the prosecution's exercise of its peremptory challenges, the so-called rule of exclusion applicable to the selection of grand and petit jury venires and

10/ See Swain, id., at 228, n.32:

> We also reject the assertion that the method of selecting veniremen in Talladega County, with its lower proportion of Negroes on the venire list, when considered with the system of peremptory strikes established a prima facie case of discrimination. Absent a showing of purposeful exclusion of Negroes in the selection of veniremen, which has not been made, the lower proportion of Negroes on the venire list sheds no light whatsoever on the validity of the peremptory strike system or on whether the prosecutor systematically strikes Negroes in the county. Moreover, the constitutional issue in regard to the prosecutor's systematic use of strikes against Negroes remains much the same whatever the number of Negroes on the venire list.

developed in a long line or facial exclusion cases. Those cases hold that proof of total or virtual exclusion of a class from jury service, coupled with a showing that members of that class qualified to serve resided within the community makes a prima facie case of discrimination, which the prosecution must then rebut with evidence that the exclusion is not the result of state discrimination (380 U.S. at 226-227). In contrast, the Court stated that an equal protection claim would "take on significance" where there was a showing that peremptories were constantly being used to exclude Blacks from all juries merely because of their race (380 U.S. 22-244). Judge Newman in holding that a showing that the Connecticut federal prosecutor has challenged 69% of Black veniremen in criminal trials over the last two years and that a disparity of 3.15% Blacks on venires to 2.11% Blacks on juries establishes a prima facie case of racial discrimination, ignored the Swain analysis.[9/] Indeed, as we now proceed to demonstrate, he effectively applied to a situation involving peremptory challenges, a standard broader than the standards applied under the rule of exclusion to test whether discrimination has occurred in the selection of jury wheels.

9/As we note fn. supra, it appears this figure should actually be 65%.

B. In Any Event No Prima Facie Case of Invidious Discrimination Was Established Under the Facts Taken Into Account by Judge Newman

As noted, Judge Newman was of the view that the general underrepresentation of Blacks on jury wheels in Connecticut "mandates that this Court not be reluctant to place some limits on the extent to which peremptory challenges can further preclude Blacks from participating as jurors in criminal trials. . . ." (App. 65) and that "the rate of exclusion of Black veniremen by prosecutors' challenges becomes less acceptable as the rate of Blacks serving on juries falls significantly below the statistically expected rate based on the prevailing Black population, even though the disparity is attributable only in part to the prosecutor's use of peremptory challenges" (App. 66). Judge Newman, therefore, held that the 5% population rate for Blacks in the District of Connecticut is "the context in which the present claim of excessive use of peremptory challenges against Blacks should be considered" (App. 66) and was unpersuaded by the fact that in Connecticut Blacks constituted 3.15% of petit jury venires and 2.11% of the jurors in the District of Connecticut. Yet in Swain, where the facts showed that while Blacks constituted 26% of males over age 21 in Talladega County, they constituted only 10-15% of the persons on grand and petit jury venires drawn since 1953, the Court applying the rule of exclusion held that "purpose discrimination based on race alone" (id. at 208-209), was not established by these statistics demonstrating

that an identifiable group in a community was underrepresented by as much as 10%. Citing Caswell v. Texas, 339 U.S. 282, 283 (1950); Thomas v. Texas, 212 U.S. 278, 283 (1909). The almost 3 to 2 ratio and 1.04% difference in respect to the exercise of peremptory challenges involved in the instant case is clearly more favorable than the roughly 2 to 1 ration and 10% difference in respect to the selection of jury wheels discussed in Swain.

While few circuits have dealt with the issues of peremptory challenges presented here, the decisions that do exist following Swain relating both to selection of venires and the exercise of peremptories further support our position. In United States v. Nelson, 529 F.2d 40 (8th Cir., 1975), cert. den., May 26, 1976 (No. 75-6411), the Eighth Circuit held that a showing the prosecution peremptorily challenged 81% of all Blacks eligible to serve on petit juries in cases involving Black defendants in the Western District of Missouri, where the proportion of Blacks in the venire (about 10%)[11/] was much higher than in

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11/ The number of Blacks in the venire in a series of trials listed in United States v. Carter, 528 F.2d 844 at 848 (8th Cir. 1975), cert. den. May 3, 1976 (No. 75-6222) indicates that if the final panels in those cases in the Western District of Missouri were about the same size as those in Connecticut, which uses the same type of jury selection process, then the average of 4.6 Blacks on each venire in Missouri would amount to 10% of the venire. (According to the United States Attorney's office in the Western District of Missouri this percentage appears correct.) That would also indicate that the prosecution there was using a substantially larger proportion of its peremptories against Black veniremen when it challenged an anverage of 3.6 of the Black veniremen in each case than is involved here.

the present case, did not establish a prima facie case of invidious discrimination. Accord, United States v. Carter, 528 F.2d 844 (8th Cir. 1975), cert. den., May 3, 1976 (No. 75-6222).[12/] Earlier, in United States v. Whitely, 491 F.2d 1248

12/ In Carter the court emphasized that any determination whether a prima facie case had been established could not be based on statistics relating solely to the trial of Black defendants (528 F.2d 850):

> Second, since the Supreme Court in Swain made it clear that race or other group affiliation is in fact a legitimate ground for challenge in an individual case, the record before us does not go far enough to demonstrate that blacks were excluded from juries "for reasons wholly unrelated to the outcome of the particular case on trial." Swain, supra, at 224, 85 S.Ct. at 838. It is difficult to conclude from only 13 cases, excluding appellant's, involving only black defendants and in over half of which there were in fact one or more black jurors accepted that the United States Attorney's office in the Western District of Missouri is systematically excluding Negroes from juries and for reasons wholly unrelated to the outcome of the particular case on trial. Similarly, the record is silent as to the peremptory challenge practices of the United States Attorney's office in cases involving nonblack defendants. We are thus unable to conclude from this record that the prosecutor is "in case after case, whatever the circumstances, whatever the crime and whoever the defendant or victim may be" peremptorily striking blacks from service on petit juries. Swain, supra, at 333 85 S.Ct. at 837.

(8th Cir., 1974) the same circuit held in relation to a complaint of invidious discrimination in the selection of jury wheels that a showing that Blacks comprise 2.33% of the total population of the Southern District of Iowa but only .28% of the venire from which a jury could be selected did not establish a prima facie case of invidious discrimination. There the court stated "a deviation of 2.05% standing alone is simply too slight to establish a prima facie case of knowing or intentional exclusion." Id., at 1249. As the court further observed in language that is equally applicable here (id., at 1249):

> *** The defendant characterizes the deviation in comparative terms and says that it exceeds 80%. While such a characterization may be proper where blacks constitute a significant proportion of the population, Alexander v. Louisiana, 405 U.S. 625...; Stephen v. Cox, 449 F.2d 657 (4th Cir. 1971), it ordinarily inappropriate where a very small proportion of the population is black. A comparative characterization in such circumstances distorts reality.

Indeed, this Court adopted the same viewpoint in respect to a similar claim in United States v. Jenkins, 496 F.2d 57, 65 (2nd Cir., 1974), cert. den., 420 U.S. 925:

> ***Judge Newman...[noted] that a 6% to 3% disparity between the census figures and the voter registration figures for the community would add to an average array of 40 to 60 veniremen only one (1) additional Negro, which he found not to be substantial enough to deprive appellants of their constitutional or statutory rights. We agree.
>
> The Act was not intended to require precise proportional representation of minority groups on grand or petit jury panels. See United States v.

> Fernandez, supra, 480 F.2d p. 733. Nor does the Constitution. See Swain v. Alabama, 380 U.S. 202, 85 S. Ct. 824, 13 L.Ed.2d 759 (1965); Akins v. Texas, 325 U.S. 398, 65 S.Ct. 1276, 89 L.Ed. 1692 (1944); United States v. Flynn, 216 F.2d 354, 388 (2nd Cir. 1954), cert. denied, 348 U.S. 909, 75 S.Ct. 295, 99 L.Ed. 713 (1955) (proportional representation "has never been a part of the Anglo-American jury system and, indeed, is repugnant to that system.") Carried to its logical conclusion appellants' argument would require that if the adult Negroes in a community constituted 1% of the population, but only 1/4 of 1% were registered voters, the 4 to 1 disparity would deny a Negro a fair trial. This we must reject. *** 13/

If the statistics in these cases do not establish prima facie cases of invidious discrimination it follows a fortiori that no prima facie case was established to show invidious discrimination in the exercise of peremptory challenges under the facts presented to Judge Newman.

13/ We note that the 6 to 3 disparity in Jenkins was entirely attributable to the jury selection process that was being attacked but that here the 3.15-2.11 disparity also includes defense challenges to Blacks.

III

THE DISTRICT COURT ERRED IN ORDERING FOUR BLACK VENIREMEN WHO HAD BEEN PEREMPTORILY STRUCK BY THE PROSECUTION RETURNED TO PETIT JURY POOL

There being no discrimination here under the rationale of Swain, Judge Newman clearly exceeded his power in ordering the four Black veniremen that the prosecution had struck returned to the petit jury pool. Article III §2 of the Constitution and Rule 23 F. R. Crim. Proc. guarantee the prosecution a right to a "jury trial". See Singer v. United States,380 U.S. 24, 34, 36 (1965); Patton v. United States, 281 U.S. 276, 312 (1930); United States v. Radford, 452 F.2d 332 (7th Cir. 1971); United States v. Igoe, 331 F.2d 776 (7th Cir., 1964), cert. den., 380 U.S. 924. See also Serfass v. United States, 420 U.S. 377, 389 (1975). This right can only be waived by the express consent of the government (Patton v. United States, supra at 312; Rule 23(a) F.R. Crim. Proc.), absent which a district court is "without power" to make any determination regarding the defendant's guilt or innocence. Serfass v. United States, supra, at 389. In insuring that the right to a jury trial is respected, the duty of a court must be discharged "with an eye to avoid unreasonable or undue departures from that mode of trial or from any of the essential element thereof...." (Patton v. United States, supra, at 312-313).

The right to a jury trial as it has come to be understood in our jurisprudence includes as one of its essential elements

the right to an unbiased jury. See Turner v. Louisiana, 379 U.S. 466 at 471-472 (1965); Irvin v. Dowd, 366 U.S. 717 at 722 (1961). The Supreme Court therefore has found it impermissible for a court to deliberately select a jury from a particular group or class of citizens. Glasser v. United States, 315 U.S. 60 (1942). As the court noted in Glasser, supra, "[t]hat the motives influencing such tendencies [to select deliberately from a particular group] may be of the best must not bind us to the dangers of allowing any encroachment on this essential right." Id. at 86. There the Court admonished (ibid):

> The deliberate selection of jurors from the membership of particular private organizations definitely does not conform to the traditional requirements of jury trial. No matter how high-principled and imbued with a desire to inculcate public virtue such organizations may be, the dangers inherent in such a method of selection are the more real when the members of those organizations, from training or otherwise, acquire a bias in favor of the prosecution. The jury selected from the membership of such an organization is then not only the organ of a special class, but, in addition, it is also openly partisan. If such practices are to be countenanced, the hard-won right of trial by jury becomes a thing of doubtful value, lacking one of the essential characteristics that have made it a cherished feature of our institutions.

Accordingly, systematic inclusion of Blacks to obtain a "proportional" biracial jury has been forbidden (Caswell v. Texas, 339 U.S. 282 (1950); Aikens v. Texas, 325 U.S. 398; Harris v. Stephens, 361 F.2d 888 (8th Cir., 1966), cert. den., 386 U.S. 964, as has the "use of irrational or self-imposed standards". United States v. Henderson, 298 F.2d 522 at 525 (7th Cir., 1967), cert. den., 369 U.S. 878. Where invidious

discrimination has been established it might be proper for a judge to impose a jury-selection remedy that would insure that discrimination in the exercise of peremptory challenges does not continue, but he clearly has no authority to appoint a particular class of individuals to a jury, as Judge Newman sought to do here.[14/]

> *** [t]he view in this country *** that the system should guarantee 'not only freedom from any bias against the accused, but also from any prejudice against his prosecution. Between him and the state the scales are to be evenly held.' Hayes v. Missouri, 120 U.S. 68, 70.

Swain v. Alabama, supra, 380 U.S. at 220.

14/ A possible remedy would be for the court to limit the number or percentage of individuals of the class discriminated against who could be peremptorily excluded from the array. And, at a minimum, the prosecutor should be allowed to assert challenges for cause concerning the individuals he sought to exclude peremptorily, if he has a basis for doing so. In that context, it would be pertinent to consider the possible impact of the exclusion, and the grounds on which it was overturned (if known to the previously excluded individuals), on the ability of the previously excluded individuals to serve as

CONCLUSION

For the foregoing reasons the petition for an order pursuant to Section 1651 of Title 28 United States Code should be granted directing the respondent herein to set aside the judgment that a prima facie case of invidious discrimination in the prosecutor's exercise of peremptory challenges in the District of Connecticut has been established and to vacate the order (App. 69-72) that the veniremen against whom the government had exercised peremptory challenges be restored to the petit jury pool in the case of United States v. Robinson, et al. Criminal No. N-76-63.[15/]

Dated: December , 1976.

Respectfully submitted,

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15/ We note that we would have no argument with any desire on the part of the district court to maintain complete records regarding jury selection. Our difficulty with this portion of the order in the present context is that it reflects the court's view that the government has been exercising its peremptory challenges in a discriminatory manner.

APPENDIX

PET APPENDIX A

The Conte affidavit (App. 43-44) indicates the prosecutor exercised 18 peremptories against 23 Black veniremen. 18 divided by 23 gives a percentage of 78.26%. If the present case is included in these figures, then 22 peremptory challenges against 27 Black veniremen, results in an exclusion rate of 81.48%.

PET APPENDIX B

The errors our survey reveal are:

1. In 6c, United States v. Mitchell, App. 87, there were two Blacks in the array. Defendants' statistics show only 1. (Both of these person appear on defendants' affidavit as Blacks, as our research confirms, although they have been omitted from the statistics in that affidavit). This increases the Blacks in the array by 1.

2. In 7c, United States v. Carlo, App. 88 there were the same two Blacks in the array as were in 6c, supra. Defendants' statistics show only 1. This increases the Blacks in the array by 1.

3. In 9c, United States v. Keish, App. 88, there were 3 Blacks in the array. Defendants' statistics show only 1 remaining after challenge for cause of another Black. This increases the Blacks in the array by 1.

4. In 33c, United States v. Chamberlain, App. 96, defendants statistics indicate one of two Blacks was eliminated by prosecution peremptory challenge. However, our research was unable to confirm that. This reduces government challenges against Black veniremen in the trial of White defendants by 1.

5. In 37c, United States v. Barry (2d Barry trial App. 97), defendants statistics indicate 1 Black was eliminated by defense challenge. Our research shows no Black in the array. This reduces defense challenges by Blacks in a trial of White defendants by 1. This also reduces Blacks in the array by 1.

PET. APPENDIX F

According to our statistics there were 2 additional Blacks in the arrays and 1 less government challenge. Taking the figures from the Conte affidavit (Pet. App. 43-44), adding 2 to the number of Blacks in the final panels and reducing the government's challenge by 1, and then dividing 52 by 80, gives a percentage of 65%.

PET APPENDIX G*

The rate at which the prosecution and defense exercised peremptories was calculated by adding the trials for which we had statistics showing the number of persons in the "final panel" and calculating the percentage of them challenged peremptorily by each side. We arrived at our figures as follows:

Trials from Appendix 86-87	Number in final panel	Def. Challenges	Govt Challenges
4c (Black)	110	5	22
6c	48	11	6
8c	36	11	6
11c	42	12	7
14c	38	5	5
15c	50	25	5
17c (Black)	66	11	6
18c (Black)	68	6	6
19c (Black)	39	10	4
20c (Black)	41	10	5
21c (Black)	26	0	2
22c (Black)	45	10	4
23c (Black)	38	10	6
24c	35	10	6
25c	44	14	8
26c	56	10	4
27c	67	10	6
28c	70	11	6
29c	41	4	5
30c	66	10	6
31c	37	11	7

* Statistics relating to 16c United States v. Marks and 39c, United States v. Bucci, were not received in time for inclusion in this computation

Trials from Appendix 86-87	Number in final panel	Def. Challenges	Govt Challenges
32c	37	11	7
" 33c	38	9	6
34c	38	11	4
35c	44	10	6
36c	37	10	5
37c	37	8	6
38c	58	24	12
Totals	1352	289	178
TOTALS FOR BLACK CASES	433 (323)	62 (57)	54 (32)

Thus the percentage of defense peremptory challenges of veniremen is (289 ÷ 1352) or 21.3%. The percentage of prosecution challenges is 178 ÷ 1352 or 13.2%. In trials involving Black defendants the percentage of prosecution challenges (not including trial, 4c which is unusual) is 57 ÷ 323 or 17.6%. In trials involving Black defendants the prosecution's percentage of challenges is 33 ÷ 323, or 10.2%.

CERTIFICATE OF SERVICE

I hereby certify that I have caused a copy of the foregoing Petition to be served on the following:

Honorable Jon O. Newman
United States District Judge
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Dated: December 13, 1976

Joseph J. Davis